

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Scripps Howard Broadcasting Company

Licensee of Station WEWS-TV, Cleveland, Ohio

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File Number EB-03-IH-0526

NAL/Acct. No. 200532080027

Facility ID No. 59441

FRN No. 003957487

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 11, 2005

Released: January 13, 2005

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the “Act”) and section 1.80 of the Commission’s rules,¹ we find that Scripps Howard Broadcasting Company (“Scripps Howard”), licensee of Station WEWS-TV, Cleveland, Ohio, recorded a telephone conversation for broadcast and twice aired a portion of that recording without informing a party to the conversation of its intention to do so, in apparent willful violation of section 73.1206 of the Commission’s rules.² Based upon our review of the facts, we conclude that Scripps Howard is apparently liable for a monetary forfeiture in the amount of \$6,000.

II. BACKGROUND

2. On November 6, 2003, the Commission received a complaint from Medical Mutual (“MedMutual”), a health insurance company doing business in Ohio.³ In its complaint, MedMutual states that, on or about the afternoon of September 18, 2003, its Manager of Media Relations, Don Olson, received a telephone call from Station WEWS-TV news reporter Duane Pohlman.⁴ According to the

¹47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

²47 C.F.R. § 73.1206.

³See Letter from Paul Mancino, III, Director, Legal Affairs and Senior Corporate Counsel, Medical Mutual, to Enforcement Bureau, Federal Communications Commission, dated October 31, 2003, as corrected by letter dated November 3, 2003 (“Complaint”).

⁴Complaint at 1.

Complaint, Mr. Pohlman requested permission to conduct an on-camera interview with Mr. Olson about a news story that Station WEWS-TV was then preparing about a claim for benefits filed by one of MedMutual's insured.⁵ MedMutual further states that Mr. Olson informed Mr. Pohlman that he could not conduct such an interview because of privacy issues.⁶ At no time during their telephone call, according to MedMutual, did Mr. Pohlman inform Mr. Olson that their conversation was being recorded for broadcast.⁷

3. Subsequently, according to MedMutual, on October 21, 2003, at approximately 11:00 p.m., Station WEWS-TV broadcast a news story containing a portion of the recording of the September 18 telephone conversation.⁸ MedMutual states that Mr. Olson contacted Station WEWS-TV the next day to express his dissatisfaction that a portion of the telephone conversation had been broadcast without MedMutual's knowledge or consent.⁹ MedMutual alleges in its Complaint that, despite Mr. Olson's objection, Station WEWS-TV *again* broadcast the same news report -- including the portion of the telephone conversation -- on October 25, 2003.¹⁰

4. By letter of inquiry dated June 16, 2004, the Enforcement Bureau directed Scripps Howard to provide information about the telephone conversation and broadcasts.¹¹ Scripps Howard responded on July 14, 2004.¹² In its Response, Scripps Howard admits that, on September 18, 2003, Mr. Pohlman placed the telephone call to Mr. Olson and recorded their conversation with the intention of subsequently broadcasting a portion of it over Station WEWS-TV.¹³ According to Scripps Howard, Station WEWS-TV broadcast excerpts from the telephone conversation on October 21 and 24 (not October 25, as MedMutual alleges).¹⁴

⁵*Id.*

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹*Id.* at 2.

¹⁰*Id.*

¹¹See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Scripps Howard Broadcasting Company, dated June 16, 2004.

¹²See Letter from Henry M. Rivera, Esq. and Mark N. Lipp, Esq., counsel for Scripps Howard, to David Brown, Esq., Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated July 14, 2004 ("Response").

¹³Response at 1-2.

¹⁴*Id.*

5. Scripps Howard concedes that Mr. Pohlman did not inform Mr. Olson during the call of Scripps Howard's intent to record the conversation and broadcast a portion of it.¹⁵ It contends, however, that it was not required to do so because Mr. Pohlman "assumed that Mr. Olson knew the conversation was being recorded and that it would or could be used in a subsequent broadcast."¹⁶ In support, Scripps Howard maintains that: (a) Mr. Pohlman had identified himself to Mr. Olson as an investigative reporter, a fact which Mr. Olson admitted during the conversation; (b) Mr. Olson had previously been an investigative reporter; (c) Mr. Olson had previously entertained requests from Mr. Pohlman's producer for an on-camera interview; (d) Ohio is a "one-party consent state" for recording telephone conversations; and (e) Mr. Pohlman believed that Mr. Olson was conversing with him "on the record."¹⁷ Scripps Howard also represents that it has engaged special communications counsel to conduct an internal investigation regarding this matter, and that it is in the process of drafting a policy for all of its stations to ensure future compliance with section 73.1206 of the Commission's rules.¹⁸ Scripps Howard also maintains that its record of compliance before the Commission is exemplary, and that this matter was an isolated incident.¹⁹

III. DISCUSSION

6. Section 73.1206 of the Commission's rules requires a licensee, "[b]efore recording a telephone conversation for broadcast ... [to] inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast."²⁰ Thus, under section 73.1206, a licensee must generally notify a party to a telephone call of its intention to record the conversation for broadcast *before* it commences such recording. The rule reflects the Commission's longstanding policy that prior notification is essential to protect individuals' legitimate expectation of privacy, as well as to preserve their dignity by avoiding nonconsensual broadcasts of their conversations.²¹ The Commission has held that the prior notification requirement ensures the protection

¹⁵*Id.* at 2.

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* at 3.

¹⁹*Id.*

²⁰ 47 C.F.R. § 73.1206.

²¹ See *Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) ("1988 Order"); 1972 *Public Notice*, 35 FCC 2d at 941; *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, Report and Order, 23 FCC 2d 1, 2 (1970); see also *WXJD Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd 22445 (Enf. Bur. 2004); *Saga Communications of New England Inc.*, Forfeiture Order, 19 FCC Rcd 19743, (Enf. Bur. 2004) .

of an individual's "right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station" live or by recording for delayed airing.²²

7. In the instant case, Scripps Howard concedes that it initiated the conversation in question, with the intention of subsequently broadcasting a portion over Station WEWS-TV. Moreover, Scripps Howard admits that it did not notify Mr. Olson, the recipient of the call, of its intention to so record and that it subsequently broadcast excerpts of the conversation on October 21 and 24 (or 25), 2003. We therefore conclude that Scripps Howard recorded a telephone conversation for broadcast without informing the other party thereto of its intention to do so.

8. Section 73.1206 articulates the limited circumstances under which no notice is required because it may be presumed that all parties are aware that their telephone conversation is being recorded for broadcast, none of which is applicable here. Under that rule, such awareness is presumed *only* when the party to the call is associated with the station or originates the call and it is obvious that the call is in connection with a program during which the station customarily broadcasts telephone conversations. Scripps Howard does not claim that these factors existed here. Indeed, in the instant case, Mr. Olson was neither associated with Station WEWS-TV, nor did he originate the telephone call in question.

9. We reject Scripps Howard's claim that it reasonably assumed Mr. Olson consented to the recording of his conversation for broadcast.²³ None of the factors articulated by Scripps Howard are relevant. With the exception of the circumstances described in our rule, a licensee must provide clear notice to an interviewee of the licensee's intent to record that person for broadcast before initiating that recording. Scripps Howard failed to provide such notice and therefore violated our rule.

10. Finally, Scripps Howard cites its "exemplary" record of compliance with FCC rules as well as its efforts since Mr. Olson's complaint to avoid future violations of the telephone broadcast rule, including the hiring of counsel to investigate the incident. Scripps Howard also states that it will develop training measures and institute a policy to ensure that such an incident does not reoccur.²⁴ As we have held previously, however, such post-violation efforts are irrelevant to our forfeiture analysis in such cases.²⁵ While Scripps Howard's promises of compliance measures are laudable, those measures should have been instituted before the broadcast at issue, not after. We also note that Scripps Howard's record of compliance is not sufficiently clean to warrant a reduction in the forfeiture amount on that basis.²⁶

²²1988 Order, 3 FCC Rcd at 5463.

²³Response at 2.

²⁴*Id.* at 3.

²⁵*See, e.g., AT&T Wireless Services, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, Notice of Forfeiture, 9 FCC Rcd 6099 (1994); *Station KGVJ, Inc.*, Memorandum Opinion and Order, 42 FCC 2d 258, 259 (1973); *see also Mid-Missouri Broadcasting Inc.*, Notice of Apparent Liability, 19 FCC Rcd 22900 (Enf. Bur. 2004).

²⁶*See, e.g., Enforcement Bureau Field Operations List of Actions Taken*, Public Notice, 17 FCC Rcd 1599 (2002) (listing Notice of Violation against Scripps Howard Station WFTS-TV, Tampa, Florida for violation of Commission

11. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(a) of the Commission's rules, 47 C.F.R. § 1.80, both state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules.²⁷ Based on the material before us, it appears that Scripps Howard apparently willfully violated section 73.1206 of the Commission's rules by recording a telephone conversation for broadcast on September 18, 2003, without providing the requisite prior notification.²⁸

12. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$4,000 in this area.²⁹ The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."³⁰

Based on our review of each of these factors, we find that an upward adjustment from the base amount is warranted here, particularly in light of Scripps Howard's decision to repeat the offending broadcast after Mr. Olson complained to the station. We therefore propose a forfeiture of \$6,000 in this instance.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to section 503(b) of the Communications Act of 1934, as amended,³¹ and sections 0.111, and 1.80 of the Commission's rules,³² Scripps Howard Broadcasting Company, licensee of Station WEWS-TV, Cleveland, Ohio, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of \$6,000 for apparently willfully violating section 73.1206 of the Commission's rules.

rule section 17.23, 47 C.F.R. § 17.23, relating to the painting and lighting of antenna structures).

²⁷See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991).

²⁸MedMutual also complains that Scripps Howard improperly aired a September 29, 2003, on-camera interview with Mr. Olson to which he had consented on the condition that Mr. Pohlman state in the telecast that Mr. Olson agreed to an on-camera interview only after receiving written permission from the MedMutual member discussed in the interview. Complaint at 2. According to the Complaint, contrary to that understanding, Scripps Howard did not air that statement during the telecast. Scripps Howard does not respond to this allegation. MedMutual does not allege that the September 29, 2003, interview or its subsequent broadcast violated the Communications Act or any Commission rule. Accordingly, we take no action on this aspect of the Complaint.

²⁹See *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

³⁰*Id.*, 12 FCC Rcd at 17110.

³¹47 U.S.C. § 503(b).

³²47 C.F.R. §§ 0.111 and 1.80.

14. IT IS FURTHER ORDERED that, pursuant to section 1.80 of the rules, within thirty (30) calendar days of the release of this NOTICE OF APPARENT LIABILITY, Scripps Howard Broadcasting Company SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, Illinois 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

16. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554 and MUST INCLUDE THE NAL/Acct. No. referenced above.

17. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.³³

18. Accordingly, IT IS ORDERED that the complaint filed against Scripps Howard Broadcasting Company, licensee of Station WEWS-TV, Cleveland, Ohio IS GRANTED to the extent set forth herein.³⁴

19. IT IS FURTHER ORDERED that a copies of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail - Return Receipt Requested to Scripps Howard Broadcasting Company, 312 Walnut Street, Cincinnati, Ohio 45202; its counsel, Henry M. Rivera, Esquire, and Mark N. Lipp, Esquire, Vinson & Elkins, LLP, The Willard Office Building, 1455 Pennsylvania Avenue, N.W., Washington, D.C. 20004; and to Paul Mancino, III, Director, Legal Affairs and Senior Corporate Counsel, Medical Mutual, 2060 East Ninth Street, Cleveland, Ohio 44115.

FEDERAL COMMUNICATIONS COMMISSION

William H. Davenport
Chief, Investigations and Hearings Division
Enforcement Bureau

³³ 47 C.F.R. § 1.1914.

³⁴ Consistent with section 503(b) of the Act and Commission practice, for the purpose of the forfeiture proceeding initiated by this NAL, Scripps Howard shall be the only party to this proceeding, 47 U.S.C. § 503(b).

